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Introduction

Thank you Jamison. Greetings from Australia and welcome everyone to my first international presentation on trans* issues. I'm both very excited and very nervous to be presenting to such celebrated company, and I thank you for giving me the opportunity to do so. Contextually, this presentation is embedded in my current PhD research where my topic is "Exploring post-operative trans* and gender diverse peoples' perceptions of psychosocial experiences surrounding the surgical process." One part of that study is looking at the regulatory framework within which trans* people in Australia operate, as this legal framework is inherently linked to the our psychosocial processes and experiences as we go about our daily lives; and this can have a direct influence on our health and wellbeing based on those personal journeys. It is that framework I will overview today. I'll look at some of the impracticalities of dealing with these systems and some specific legislation which could have negative consequences for some trans* people, and conclude with a way forward to improve the lack of consensus that will become evident.

The Australian System

There are multiple layers of government in Australia. The Commonwealth of Australia operates under a federal system of government where powers are divided between the Commonwealth government and the six States. On top of this, there are also two Territories on the mainland; that is, land not claimed by the States, who have a limited right to self-government. These territories are often seen as States outside of government circles due to their population base. Under Sections 51 and 122¹ of the Australian Constitution, the Commonwealth Government has the power to pass laws affecting the entire nation. The States also have their own constitutions

¹ The Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of the Parliament to the extent and on the terms which it thinks fit.

and pass laws that are not controlled by the central government as laid out in Section 51 of the Constitution. To add to this complexity, both jurisdictions pass other laws which fall outside these criteria. Such laws include the various sex, anti-discrimination and equal opportunity Acts around the country.

The Commonwealth

In 1984 the Commonwealth Government introduced the Sex Discrimination Act, which conveyed no rights to trans* people. It wasn't until late last year that the Sex Discrimination Amendment (Sexual Orientation, Gender identity and Intersex Status) Bill was passed and this has gone some little way at least, when trans* people deal with the Commonwealth Government and its departments some measure of protection and recognition. Also, in July 2013, the Commonwealth introduced guidelines on the recognition of sex and gender. These guidelines, which only apply at the Commonwealth level, aimed to develop a consistent classification system on Commonwealth Government records and a consistent standard of evidence to change sex and gender markers. However, these guidelines are just that – guidelines, and could be revoked by any incoming government should they decide to do so. At this point, Commonwealth government departments and agencies have until July 2016 to implement those guidelines. This process has already begun and trans* people can change their sex and gender markers in key areas such as health, pensions and taxation, and this list will be added to over time. This is indeed a welcome development for trans* people in my country but at the same time causes confusion amongst trans* people because some think it applies to the States and Territories as well.

However, the States and Territories also have their own versions of the Sex Discrimination Act, all of which have varying degrees of protection, if any.

The States

As you can see from the slide, there are 11 separate pieces of anti-discrimination legislation which can impact upon trans* people at the State level. However, there is no consensus on their approach to this area. Several jurisdictions (the ACT, South Australia and Victoria) make it unlawful to discriminate on the grounds of gender identity, and the definition of gender identity in these instances is considered broad enough to include both medical intervention and/or social circumstances as an

appropriate basis to identify as a person of another gender. In Western Australia, protection is given in certain cases and only to those who have been gender reassigned, which is defined as someone who has been issued with a Gender Recognition Certificate under the Act. In Queensland you must live or seek to live as a member of the opposite sex. In New South Wales, the Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996 offers protection to a recognised transgender person by living, seeking to live or identifying as a member of the opposite sex, and being thought of as a transgender person. In the Northern Territory, the sexual characteristics or imputed sexual characteristics of a person are protected. However, Tasmania considers transsexuality to be aligned with sexual orientation and is not expressly protected.

Changing Documentation

One area that is always a contentious issue around the world is the changing of documentation to match your gender identity, and Australia is no different. It continues to be a concern for many trans* people, some of whom don't actually bother to attempt the change because they perceive there are too many hoops to jump through, and others somehow go around the system and get their records changed when not really entitled to it under State and Territory law. Others have challenged the law and won. It is the States and Territories that administer this area, and once again little consistency is evident. As I detail some of the requirements, you can see from data collected in my study what some trans*people are saying on this issue.

Five of the eight States and territories have a definitive approach which stipulates SRS, defined essentially as the removal of reproductive organs is required to change your gender marker. In addition, all of these except for the ACT require the person to be unmarried, which is interesting in that we don't have same sex marriage legislation in Australia. So therefore, in the ACT, I could be married, have SRS, remain married, change my gender marker and be part of a same sex marriage which isn't recognised under Australian law. The ACT parliament has also recently introduced a bill to amend the BDMR Act to remove the SRS requirement. However, it is of considerable concern that no recognition is given to those born abroad living in the ACT or in fact anybody born outside the ACT. It is in process

and it will be interesting to see if it is passed and the flow on effects it may have. Both South Australia and Western Australia have legislation specifically for gender reassignment and are similar in definition of their requirements.

In Western Australia, a reassignment procedure is indicated by a medical or surgical procedure (or a combination of such procedures) to alter the genitals and other gender characteristics of a person. Gender characteristics refer to the physical characteristics of a person that identifies them as male or female. In South Australia, substitute sex for gender. In Western Australia, two trans* men who were on hormone therapy and had bilateral mastectomies, were refused Gender Recognition Certificates because they still had female reproductive organs. They successfully challenged this ruling in the High Court of Australia in 2011. This ruling effectively means that hormone therapy is sufficient to change your gender marker in that State.

The South Australian legislation has been described to me as quite prescriptive by one trans* person who went through the system and it is vehemently opposed by the medical profession as well. ANZPATH has recommended the Act be repealed. Although trans*men can be issued a Gender Recognition Certificate just by having top surgery alone.

But what if you are born overseas and wish to be recognised and protected under the law in Australia? As I mentioned, nothing is catered for in the proposed amendment in the ACT BDMR Act for overseas people to be recognised in that Territory. In other States, Recognised Details Certificates will only be issued to overseas applicants in Victoria and New South Wales. Although once again in Western Australia, an English trans*woman was refused a Gender Recognition Certificate on the basis that she had already changed her gender marker in her own country and was considered female. She successfully challenged that decision in the State Administrative Tribunal in 2012. You may ask why did she bother if her documentation was in order? She needed that Gender Recognition Certificate to be protected under the Equal Opportunity Act. Once more, this determination gives precedence to the previous judgement in the High Court because this particular trans* woman did not have SRS. In any event, those trans* people born overseas and now permanent residents or citizens in this country, except for New South Wales and Victoria, are not legally recognised and therefore are not protected.

Passports

One point that could be considered as a positive is the relaxation of the Australian Passports Act 2005. As of November 2011, SRS is no longer a requirement. Yes, that is positive in one respect because it goes some way in removing discrimination based upon your gender preferences. And yes it removes some administrative burden on trans* people wishing to travel. But this set of guidelines has also been labelled as a “Gesture,” “Cart before the horse” and “Harmful.” So why is it considered such?

In 2009, the Sex Files Project conducted by the Australian Human Rights Commission, recommended sweeping reforms to validate and legally recognise sex and gender diverse people and to make it easier for us to deal with day to day life and just get on with things. Unfortunately, most of those recommendations are gathering dust. Relaxing of passport requirements, recognising gender identity and changing documentation at the Commonwealth level is welcomed but merely seen as a “gesture.” The Commonwealth amended the Sex Discrimination Act 1984 in 2011 to exempt the States and Territories from altering official records of a person’s sex if that person is married, effectively giving them the right to discriminate against trans* people. Unlike some other countries such as the UK, where having surgery is not a requirement to change your gender marker in your birth certificate, as I have shown you, the majority of Australian States and territories require surgery to do so. Its effect is to burden those of us who, for whatever reason cannot change our birth certificates. So many trans*people have two sets of documentation each denoting a different gender marker. So how is this “Harmful?”

Many trans*people who pursue SRS go overseas for their surgery. In fact, trans*men have no other option as bottom surgery is not available in Australia. Being in a foreign country with two sets of documentation, one saying you are male and the other saying you are female can lead to unforeseen consequences if detained. Our very own national airline in Australia has a no fly policy if documentation is conflicting, and other ports of entry may deport trans* people in these circumstances back to Australia. And that is putting the “Cart before the Horse.” Until such time that the States and Territories align with the Commonwealth,

and there is one set of laws pertaining to all, the health and wellbeing of Australian trans* men and women will continue to be negatively impacted.

The Way Forward

So what now? The Sex Files project was a good beginning but did not come from an all of government standpoint. The majority of the State and Territory Governments were not involved. Feedback was only sought within certain areas of the Commonwealth government and only three States were consulted. I strongly recommend a consolidated approach involving the Council of Australian Governments (COAG) and the Council of Australian Registrars (COAR). These, along with trans*people themselves and the Australian Human Rights Commission as the major stakeholders can arrive at a consensus on appropriate legislation across the board so that Aussie trans* identities can get on with their lives. Surely it's not that hard because one of the biggest single contributors to mental health problems including suicide are the myriad of laws enacted by nine governments, that lead to a complete lack of understanding within the trans* community.

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